88-1262

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

BUTCH BURKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether evidence of Appellant's reliance upon an official interpretation of the law issued by an appropriate government official, offered to support Appellant's mistake of law defense was properly excluded.

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William A. Harrison, on behalf of Petitioner Butch Burke, respectfully prays that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Court of Appeals issued a memorandum opinion No. 87-1331, which appears in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 5, 1988. The time in which to file a petition for writ of certiorari expires on February 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §922(h)(1) provides:

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment.

> (1) to receive, possess, or transport any firearm or ammunition in affecting interstate or foreign commerce.

18 U.S.C. Appendix §1202(a)(1) provides:

(a) Persons liable; penalties for violations. Any person who:

> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act [enacted June 19, 1968], any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

On May 30, 1985, in Hawaii State Court, Appellant Butch Burke ("Appellant") pled no contest to selling cable television descrambler boxes in violation of Hawaii Revised Statutes §275-9(2). Circuit Court Judge Leland Spencer then sentenced Appellant to probation. This is the underlying conviction that gave rise to Appellant's status as a felon.

In a letter dated September 19, 1985, Appellant's then-counsel William Patrick O'Connor asked Judge Spencer whether the Appellant could possess firearms at his place of business. In Judge Spencer's reply dated September 28, 1985, he stated:

> I did not impose as a condition of probation a prohibition concerning possession of firearms. You have requested that I issue an order permitting Mr. Burke to keep weapons at the pawn shop. I will not issue an order permitting the defendant to possess a firearm. This issue is not properly before my court and I do not have jurisdiction to issue the order which you request.

The foregoing letters were, *inter alia*, the subject of a motion in limine brought by the United States at Appellant's trial in United States District Court of the District of Hawaii for violations of 18 U.S.C. §§922(h)(1) and 924(a) which prohibit possession of a firearm by a felon and 18 U.S.C. Appendix §1202(a) which prohibits receipt and possession of a firearm by a felon.

At the hearing on the prosecution's motion in limine, Appellant's counsel argued that the letters were offered to show that Appellant was unsure of his status as a felon, unsure about his ability to possess firearms, that he

sought advice and reasonably relied upon Judge Spencer's reply in believing that a bar to possession of firearms was not a term of his probation.

In the court order excluding the aforementioned letters, the United States District Court stated that ignorance of the law is no defense, and that Appellant's lack of knowledge of the illegality of his conduct is no defense, therefore, the letters were irrelevant.

The court, however, did not address the relevancy of the letters to a mistake of law defense. Indeed, both the court and the prosecution misinterpreted Appellant's defense to be one of lack of intent or scienter.

The order granting the motion in limine precluded all evidence of mistake of law based upon an official interpretation of the law. Having been foreclosed from this defense, at trial Appellant relied solely on a defense or reasonable doubt that he actually received and possessed a firearm.

At the conclusion of trial, Appellant was found guilty on both counts.

REASONS FOR GRANTING THE PETITION

1. THE ISSUE AT BENCH IS OF IMPORTANCE TO THE PUBLIC AS THE DECISION BELOW CASTS INTO DOUBT THE VALIDITY OF THE MISTAKE OF LAW DEFENSE.

The Court of Appeals' decision misses the point. By seeking to introduce evidence letters exchanged between his trial counsel and the state court judge that heard the case that gave rise to his status as a felon, Appellant

sought to establish a mistake of law defense. Based upon his interpretation of a letter authored by Judge Spencer in response to an inquiry regarding his ability to possess firearms, Appellant believed that he could legally possess firearms.

However, in a brief, one-page discussion, the Court of Appeals treats Appellant's argument as being one of lack of specific intent. Moreover, the Court of Appeals further states that evidence of an entrapment by estoppel defense was properly excluded as Judge Spencer was unauthorized to interpret federal law, Appellant was not affirmatively misled and that his reliance on Judge Spencer's letter was not reasonable. Finally, as if an after thought, the Court of Appeals noted that the issues raised by Appellant there bear little relationship to his trial testimony.

In support of the proposition that the Appellant's knowledge is irrelevant to a violation of 18 U.S.C. §1202(a), the Court of Appeals cites Fed.R.Evid. 402; *United States v. Houston*, 547 F.2d 104, 108 (9th Cir. 1976) and *United States v. Locke*, 542 F.2d 800, 801 (9th Cir. 1976). However, Appellant submits that mere recitation of the foregoing authorities is inconclusive and does not dispose of the proffered evidence as irrelevant. First, recitation of Fed.R.Evid. 402 merely begs the question of relevancy. Furthermore, reliance on *Houston, supra,* is inappropriate, as the instant case is not one of specific intent, but of a mistaken belief born of reliance upon an official pronouncement of the law. Indeed, while the Memorandum Opinion implies that a violation of §1202(a) is a strict liability offense, the court in its earlier decision *United States v. Tallmadge*, 829 F.2d 767, 776 (9th

Cir. 1987) states that a person's knowledge will vitiate his liability under §§922(h) and 1202(a). *Id.* at 774. Finally, citing to *Locke, supra,* is equally inappropriate as *Locke* is factually distinguishable. Although *Locke* also involved a violation of §1202(a), the similarity ends there as the pivotal issue therein was whether the defendant was a felon, and there was no mistake of law issue raised. Moreover, although the Court of Appeals in *Locke* noted that the defendant "may have been advised by a public defender that he was not a convicted felon," (*Locke* at 801) Appellant submits that the opinion of a public defender is qualitatively different from that of the judge that sat at Appellant's trial (the opinion does not indicate whether said public defender was even Locke's counsel).

Citing *Tallmadge, supra,* the Court of Appeals then reasons that because: a) a state court judge is not authorized to interpret a federal statute; b) Appellant was not a ffirmatively misled; and c) Appellant's reliance was not justified; it was not error to exclude evidence of an entrapment by estoppel defense. However, the cited portion of *Tallmadge, Id.* that the Court of Appeals relies on is *dicta!* Indeed, review of the opinion in *Tallmadge* presents a factual situation that is not as compelling as that of the instant case. The Court of Appeals held that *Tallmadge* was entitled to rely on a gun dealer's interpretation of his legal status and acquitted him because it construed licensed gun dealers to be federal agents qualified to ascertain a firearm purchaser's legal status. Hence, it is the Appellant's position that to deem a gun dealer's assessment of a firearm purchaser's legal status to be more authoritative then a state court judge's strains all logic. Indeed, a gun dealer has a pecuniary interest in the

very transaction he is asked to approve or disallow. Moreover, the Court of Appeals acquitted Tallmadge despite the fact that he was instructed at trial that he was a felon and could not later deny that he was a felon, then subsequently lied when completing the U.S. Department of the Treasury's Firearms Transaction Record, stating that he had not been convicted of an offense carrying a potential imprisonment of more than a year. *Id.* 768, *See also, Raley v. Ohio,* 360 U.S. 423, 437 (1959) (it was sufficent that the person who rendered the misleading instructions that caused defendants to violate the law merely "appeared to be the agent of the State").

In the instant case, the person appellant relied on was the state court judge that convicted him. The Court of Appeals deemed that judge to be unauthorized to interpret federal statutes, therefore the proffered evidence was properly excluded. However, when Judge Spencer addressed Appellant's inquiry about possessing firearms, he did not "interpret a federal statute" as the Court of Appeals states in its memorandum opinion. Judge Spencer's instructions were in regard to Appellant's state court proceedings. Moreover, the Court of Appeals' pronouncement flies in the face of *United States v. Barker,* 546 F.2d 940, 949 (DC Cir. 1976), wherein the defendant "White House Plumbers" were allowed to rely on the *apparent authority* of a CIA agent in breaking into a psychiatrist's office to steal the medical records of a patient. The present case presents a stronger argument in favor of admitting the evidence in question, as it was reasonable for the Appellant to rely on the statements of the judge that convicted him. This is especially so when

the offense in question *mala prohibita* (violation of a regulatory scheme), where the inquiring party has no innate sense of the propriety of his contemplated act and is reliant upon those charged with interpreting the law, as opposed to the offense in *Barker, Id.* which was *mala in se* (breaking and entering an office), where one's life experience tells him that what he is doing is wrong.

As for satisfaction of the Court of Appeals' requirement that the official pronouncement of the law affirmatively mislead the defendant, Appellant refers to this Court's seminal mistake of law based upon an official pronouncement decision of *Raley v. Ohio, supra,* where the defendant therein was permitted to advance a mistake of law defense despite what this Court deemed to be "vague and undefined" instruction rendered by the government authority in *Raley* was allowed to assert a mistake of law defense based on the statements made to the other co-defendants but overheard by him. *Id.*, at 439. Therefore, it is not essential that the language attributed to a public official be affirmatively misleading or even directed at the one who claims the defense, as words that inadvertently mislead can just as easily ensnare the unwitting citizen.

As to the Court of Appeals' third element, that of reasonableness, Appellant has reviewed *Raley, supra,* and its progeny and is unable to find an authority that deems the reasonableness of a defendant's reliance to be controlling. Indeed, it appears that the Court of Appeals is equally unable to cite case law or other controlling authority for any of the three foregoing elements, as it merely cites as its authority the *dissenting opinion* from

Tallmadge, supra, which in turn cites only the Model Penal Code.

Finally, almost as an afterthought, the Court of Appeals adds that the evidence sought to be adduced by the excluded letters does not comport with Appellant's trial court testimony. This ignores Appellant's argument that at trial, the motion in limine precluded him from asserting a mistake of law argument, his most salient defense. Therefore his testimony was constrained to the point of incredulity. Thus, the Court of Appeals' rationale begs the questions whether Appellant's trial testimony would have been more believable had he been able to argue his mistake of law defense.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and memorandum of opinion of the Ninth Circuit.

WILLIAM A. HARRISON
Attorney for Petitioner
Butch Burke

January 1989

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 87-1331
Plaintiff-Appellee,	)	D.C. No. CR 87-0607-ACK
v.	)	MEMORANDUM*
BUTCH BURKE, aka ABBITT OWENS, JR.,	)	(Filed December 5, 1988)
Defendant-Appellant.	)	

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Submitted October 28, 1988**

Before: NELSON, NOONAN, and LEAVY, Circuit Judges.

Butch Burke appeals his conviction for being a felon who knowingly received a firearm which had been shipped and transported in interstate and foreign commerce, in violation of 18 U.S.C. §§ 922(h)(1) and 924(a), and for being a felon who knowingly received and possessed in commerce and affecting commerce a firearm, in

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*This deposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. p. 34(a), Ninth Circuit Rule 34-4. Accordingly, Burke's request for oral argument is denied.

violation of 18 U.S.C. Appendix § 1202(a). Burke contends the district court erred by granting a motion in limine excluding evidence regarding his knowledge of his felon status and the lawfulness of receiving and possessing a firearm. He also contends the district court likewise erred in excluding evidence in support of his entrapment by estoppel defense.

The district court did not err in excluding Burke's proffered evidence regarding his knowledge because such evidence is irrelevant in a conviction under section 1202(a). Fed. R. Evid. 402; *United States v. Houston*, 547 F.2d 104, 108 (9th Cir. 1978); *United States v. Locke*, 542 F.2d 800, 801 (9th Cir. 1976). The district court did not err in denying Burke's proffered evidence in support of an entrapment by estoppel defense because the state court judge was not authorized to interpret a federal statute, the state court judge did not affirmatively mislead Burke, and Burke's reliance on the state judge's statement was not reasonable. *See United States v. Tallmadge*, 829 F.2d 767, 776 (9th Cir. 1987) (Kozinski, J. dissenting).

We hold that the issues presented to the district judge on the motion in limine were correctly decided. We further note that the issues presented by the motion bear little relationship to the defendant's testimony at trial when he said:

> A. Somewhere along the line it's very difficult for me to remember exactly what happened . . .
>
> Q. Okay
>
> A. . . . during that time of the gun. But I had just been convicted of a felony, and I had just surrendered my other shotguns and rifles that I had,

and I wasn't about to purchase another one to get myself in trouble again.

I know that I wasn't supposed to buy or sell a gun.

The judgment is AFFIRMED.